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CURRENT REGULATION OF AIR CARRIERS' LIABILITY AND COMPENSATION ISSUES IN DOMESTIC AIR CARRIAGE IN NIGERIA

ADEJOKE O. ADEDIRAN*

ABSTRACT

Air carriage forms a large percentage of movement within Nigeria, as it has been the safest, fastest, and most reliable means of transportation within the country. Intermittent air accidents and flight delays—without appropriate compensation—are some of the problems facing air carriage with respect to customer satisfaction. Although the legal regime of liability seeks to protect, at least to a certain extent, air passengers and third parties, a good number of persons affected by air carriage are unaware of their rights and the obligations of air carriers during air carriages. This, and the dearth of sufficient academic research in this area, has made this topic worthy of consideration.

This article examines the regime of liability of air carriers as well as compensation in domestic air carriage in Nigeria. This article reviews the current legal regime and determines how it can effectively accommodate and alleviate impediments to protect passengers and third parties. This article finds that there is a need for domestic legislation to exhaustively address liability in air carriages, generally, and insurance on aviation issues.

I. INTRODUCTION

“**A**IR TRANSPORTATION CONTRIBUTES immensely to global economic growth,” as the civil aviation industry facilitates economy, trade, and tourism.¹ Air transportation has

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¹ Adejoke O. Adediran, *States' Responsibility Concerning International Civil Aviation Safety: Lessons From the Malaysia Airlines Flight MH17 Air Crash*, 14 ISSUES IN AVIATION L. & POL'Y 313, 316 (2015).

become a primary means of common carriage in Nigeria, especially owing to natural factors such as the large size of the country and the topography.² With the mishaps associated with domestic air carriages, experts projected that Nigeria's domestic air travel figures for 2013 would drop significantly from 2012 figures.³ Some experts "suggest[ed] that the case might be similar or worse for 2014 if nothing [was] done to address the local aviation sectors [sic] problems."⁴ The domestic air travel figures dropped in 2012;⁵ however, they increased in 2014.⁶ A total of 10,074,528 passengers traveled domestically in 2013.⁷ That number increased to a total of 10,681,165 in 2014.⁸ This reveals the essence of air travel within Nigeria and it is therefore necessary that the regime of liability adequately secures the interests of passengers and third parties.

This article discusses domestic air carriage only as it relates to carriage of persons, baggage, or cargo by aircraft for reward on scheduled flights.⁹ Next, the article examines the liability of air

² S.I. Ladan, *An Analysis of Air Transportation in Nigeria*, 10 J. RES. NAT'L DEV. 230, 230 (2012).

³ *Nigeria's Air Travel Figures Expected to Drop Significantly*, GLOB. TRAVEL INDUS. NEWS (Jan. 1, 2014, 10:23 PM), <http://www.eturbonews.com/41292/nigeria-s-air-travel-figures-expected-drop-significantly> [<https://perma.cc/YTN5-BAVH>].

⁴ *Id.*

⁵ This was due to the air accident involving Dana Airline in June 2012. See ACCIDENT INVESTIGATION BUREAU NIGERIA, AIB REPORT NO: DANA/2012/06/03/INTR/03 (2015), <http://www.aib.gov.ng/publication.php> [<https://perma.cc/TK6M-5RQC>].

⁶ NAT'L BUREAU OF STATISTICS, NIGERIAN AVIATION SECTOR, SUMMARY REPORT OF PASSENGER TRAFFIC: 2010–13 AND Q1, 2014 (2014), <http://www.nigerianstat.gov.ng/nbslibrary/searchdoc> [<https://perma.cc/RCP6-AZ58>] [hereinafter NAT'L BUREAU OF STATISTICS, SUMMARY REPORT: 2010–13 AND Q1, 2014].

⁷ NAT'L BUREAU OF STATISTICS, NIGERIAN AVIATION SECTOR, SUMMARY REPORT: Q4, 2014 TO Q1, 2015 (2015), <http://www.nigerianstat.gov.ng/nbslibrary/searchdoc> [<https://perma.cc/RCP6-AZ58>] [hereinafter NAT'L BUREAU OF STATISTICS, SUMMARY REPORT: Q4, 2014 TO Q1, 2015].

⁸ NAT'L BUREAU OF STATISTICS, SUMMARY REPORT: 2010–13 AND Q1, 2014, *supra* note 6; NAT'L BUREAU OF STATISTICS, SUMMARY REPORT: Q4, 2014 TO Q1, 2015, *supra* note 7; NAT'L BUREAU OF STATISTICS, NIGERIAN AVIATION SECTOR, SUMMARY REPORT: Q2–Q3, 2014 (2015), <http://www.nigerianstat.gov.ng/nbslibrary/searchdoc> [<https://perma.cc/RCP6-AZ58>].

⁹ This article only discusses liability in relation to commercial flights. This is in line with the Convention for the Unification of Certain Rules for International Carriage by Air (Montreal Convention) signed at Montreal on May 28, 1999, which is a major international convention governing aviation liability. Its scope of application encompasses only carriage for reward. See Convention for the Unification of Certain Rules for International Carriage by Air art. 1, *opened for signature* May 28, 1999, T.I.A.S. 13038, 2242 U.N.T.S. 350 [hereinafter Montreal Convention].

carriers¹⁰ to passengers and to third parties as it relates to death and bodily injury; damage to personal property or cargo; delay of persons, baggage, or cargo; cancellation of flights; denied boarding; and damage to third persons on the ground.

First, this article briefly discusses the liability regime in international civil aviation and its applicability to Nigeria because this forms the basis of the liability regime in Nigeria. Next, this article examines the legal regime of aviation liability and compensation in Nigeria. Under this subheading, this article examines the legal framework presently in place. It explores legislation that is not based on aviation but on which aviation claims can be made. Tort law, criminal law, and contract law in Nigeria are examined to the extent that they impose liability on damage for injury. The article also examines the victim compensation regime in the event of accident, flight delay, denied boarding, cancelled flights, and damage to third parties. The challenges of existing legislation on liability are brought to light in determining the need for reform.

II. THE LIABILITY REGIME IN INTERNATIONAL CIVIL AVIATION AND ITS APPLICABILITY TO NIGERIA

Aviation liability has been a concern since the inception of international civil aviation.¹¹ The inevitability of hazards occurring during air movements has brought about a regime of liability.¹² The aim of this regime is to protect passengers on board as well as third parties on the ground.¹³ It covers the liability of air carriers to passengers and third parties¹⁴ and, through various international instruments, apportions liability and provides compensation for victims of mishaps.¹⁵

¹⁰ See Nigeria Civil Aviation Regulations (2015), pt. 19.1.2.1(2) (“Air carrier means an enterprise that engages in provision of transportation services by aircraft for remuneration or hire. . . . [T]he words ‘Air Carrier’ and ‘Airline’ are used interchangeably.”).

¹¹ International conventions on liability came about as a result of the desire to establish a uniform body of aviation rules that supersede conflicting domestic laws. See James David Simpson, Jr., *Air Carriers’ Liability Under the Warsaw Convention After Franklin Mint v. TWA*, 40 WASH. & LEE L. REV. 1463, 1463–64 (1983); see also Andrea L. Buff, *Reforming the Liability Provisions of the Warsaw Convention: Does the IATA Inter-carrier Agreement Eliminate the Need to Amend the Convention?*, 20 FORDHAM INT’L L.J. 1768, 1768 (1997).

¹² See generally Montreal Convention, *supra* note 9, art. 1.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

Nigeria is a state that is party to a number of these international conventions, and domestication of these conventions is a prerequisite for their applicability in Nigeria.¹⁶ National laws in Nigeria have been enacted to accommodate the international conventions governing liability.¹⁷ Under Nigeria's Civil Aviation Repeal and Re-Enactment Act of 2006 (Civil Aviation Act), the conventions regulate not only international flights, but also domestic flights.¹⁸

A. THE LIABILITY OF AIR OPERATORS TO PASSENGERS

The liability of air operators to passengers in international civil aviation is governed by two main instruments: (1) the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed in Warsaw on October 12, 1929, otherwise known as the Warsaw Convention;¹⁹ and (2) the Convention for the Unification of Certain Rules for International

¹⁶ See CONSTITUTION OF NIGERIA (1999), § 12 (“(1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.”).

¹⁷ See Civil Aviation Repeal and Re-Enactment Act (2006) 93:61 O.G., sched. III, art. 1(1) (Nigeria) [hereinafter Civil Aviation Act (Nigeria)].

¹⁸ *Id.*; see generally Convention for the Unification of Certain Rules Relating to International Carriage by Air ch. III, *opened for signature* Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].

¹⁹ Additional protocols were later added to the Warsaw Convention of 1929 and make up the Warsaw System. However, member states to the original Warsaw Convention retained the right not to assent to and sign any of the additional protocols. Such a state will be bound by the Warsaw Convention but not by those additional instruments to which it did not agree. The additional instruments are: (a) Protocol on Modification of the Convention Relating to Unification of Certain Rules in International Carriage by Air, signed in Hague on September 28, 1955 (the Hague Protocol); (b) Convention on the Amendment of the Warsaw Convention Relating to Unification of Certain Rules in International Carriage by Air Performed by a Non-contractual Carrier, signed in Guadalajara on September 18, 1961 (the Guadalajara Convention); (c) Protocol for Modification of the Convention relating to Unification of Certain Rules in International Carriage by Air, signed in Guatemala City on March 8, 1971 (the Guatemala Protocol); (d) Additional Protocols 1 through 3 and the Montreal Protocol No. 4 for the Amendment of the Warsaw Convention, modified by the Hague Protocol or the Warsaw Convention modified both by the Hague Protocol and the Guatemala City Protocol, signed in Montreal on September 25, 1975 (the Montreal Protocols). See Montreal Convention, *supra* note 9, art. 55. Nigeria only ratified the Hague Protocol and the Guadalajara Convention; both instruments became effective in Nigeria in 1969. See ICAO, *Status of Nigeria with Regard to International Air Law Instruments*, http://www.icao.int/secretariat/legal/Status%20of%20individual%20States/nigeria_en.pdf [<https://perma.cc/HTC7-DCRZ>].

Carriage by Air of 1999, otherwise known as the Montreal Convention.²⁰

The Warsaw Convention established rules and limitations of liability for international air carriage.²¹ It established uniform rules that ensured adequate and reliable recovery for injury to persons or property.²² The Warsaw Convention was domesticated in Nigeria by the Carriage by Air (Colonies, Protectorates, and Trust Territories) Order 1953, which was contained in Vol. XI of the 1958 Laws of the Federation of Nigeria.²³ Through this legislation, the Warsaw Convention governed domestic air carriage in Nigeria.²⁴ However, the Civil Aviation Act repealed the Carriage by Air (Colonies, Protectorates, and Trust Territories) Order 1953.²⁵ Consequently, the Warsaw Convention no longer applies to domestic air carriages within Nigeria.²⁶

The Montreal Convention, on the other hand, consolidated the liability already established.²⁷ The Montreal Convention provided for an unlimited liability regime—a two-tier liability system—for damage sustained in case of death or bodily injury of passengers;²⁸ for “damage sustained in case of destruction or loss” of baggage or cargo;²⁹ for “damage occasioned by delay in

²⁰ See generally Montreal Convention, *supra* note 9.

²¹ See generally Warsaw Convention, *supra* note 18.

²² GEORGE N. TOMPKINS, JR., LIABILITY RULES APPLICABLE TO INTERNATIONAL AIR TRANSPORTATION AS DEVELOPED BY THE COURTS IN THE UNITED STATES: FROM WARSAW 1929 TO MONTREAL 1999 (2010).

²³ *Ibidapo v. Lufthansa Airlines* [1997] 4 NWLR 124 (Nigeria).

²⁴ Because the Carriage by Air (Colonies, Protectorates, and Trust Territories) Order 1953 was not included in the 1990 Laws of the Federation Republic of Nigeria, the issue as to whether the Warsaw Convention still applied became a subject of legal scuffle. The question was eventually resolved in the case of *Ibidapo v. Lufthansa Airlines* [1997] 4 NWLR 124, where the Nigerian Supreme Court held that the Carriage by Air (Colonies, Protectorates, and Trust Territories) Order 1953, which adopted and otherwise ratified the Warsaw Convention in Nigeria, was still a relevant and applicable law in Nigeria.

²⁵ Civil Aviation Act (Nigeria), *supra* note 17, § 77(I)(a).

²⁶ See *id.*

²⁷ The Montreal Convention “recogniz[es] the significant contribution of the [Warsaw Convention] and other related instruments to the harmonization of private international air law . . . [and] recogniz[es] the need to modernize and consolidate the Warsaw Convention and related instruments.” See Montreal Convention, *supra* note 9, pmb.

²⁸ *Id.* art. 17.

²⁹ *Id.* art. 17, 18.

the carriage by air of passengers, baggage or cargo;”³⁰ and for recourse claims from air operators to manufacturers.³¹

In 2002, Nigeria ratified the Montreal Convention.³² The Civil Aviation Act domesticated the Montreal Convention and provided that the provisions of the Montreal Convention, as contained in the Civil Aviation Act and as amended from time to time, shall have the force of law.³³ It fully incorporated the whole of the Montreal Convention and modified it to be applicable to domestic carriages within Nigeria.³⁴ The Montreal Convention thus forms the basis of liability of air operators to passengers in domestic air carriage in Nigeria.³⁵ The Montreal Convention’s provisions will be discussed in detail under the legal regime of domestic air carriage in Nigeria.

B. LIABILITY OF AIR OPERATORS TO THIRD PARTIES ON THE GROUND

The liability of air operators to third parties on the ground in international civil aviation is governed by the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (the Rome Convention), signed in Rome on October 7, 1952,³⁶ and the Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, adopted and signed in Montreal on September 23, 1978 (the Montreal Protocol).³⁷

The Rome Convention covers damage caused directly to persons and property on the ground in a contracting state by an

³⁰ *Id.* art. 19.

³¹ *Id.* art. 37 (which provides for the “[r]ight of [r]ecourse against [t]hird [p]arties”).

³² ICAO, *Status of Nigeria with Regard to International Air Law Instruments*, *supra* note 19.

³³ Civil Aviation Act (Nigeria), *supra* note 17, sched. III, art. 1(1).

³⁴ See *id.* scheds. II, III (the convention is set out in Schedule II of the Civil Aviation Act (Nigeria) while modifications are set out in Schedule III).

³⁵ *Id.* sched. III, art. 1(1).

³⁶ The Convention for the Unification of Certain Rules Relating to Damage Caused by Aircraft to Third Parties on the Surface, signed in Rome on May 29, 1933, was ratified by only five states; the Rome Convention was adopted in 1952 and superseded the earlier instrument. Michael Gill, *Scratching Beneath the Surface: The Unlawful Interference Convention 2009*, in FROM LOWLANDS TO HIGH SKIES: A MULTILEVEL JURISDICTIONAL APPROACH TOWARDS AIR LAW: ESSAYS IN HONOUR OF JOHN BALFOUR 228 (Pablo Mendes de Leon ed., 2013).

³⁷ See generally Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, *opened for signature* Sept. 23, 1978, 2195 U.N.T.S. 370 [hereinafter Montreal Protocol].

aircraft registered in a foreign contracting state. The Montreal Protocol amended the provisions of the Rome Convention³⁸ and revised and raised the limits of liability, and the Special Drawing Rights (SDR) replaced the gold franc as the unit of currency.³⁹ Two other conventions were adopted in 2009, namely the Convention on Compensation for Damage Caused by Aircraft to Third Parties⁴⁰ and the Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft.⁴¹ However, these two conventions are not yet in force.⁴²

Nigeria adopted the Rome Convention on March 6, 1970,⁴³ however, on May 10, 2002, the Government of Nigeria issued an instrument of denunciation of the Rome Convention, which took effect on November 10, 2002.⁴⁴ Further, Nigeria did not

³⁸ *Id.* art. 1; Gill, *supra* note 36, at 229.

³⁹ See Montreal Protocol, *supra* note 37, art. 3; Paul Steven Dempsey, *Aircraft Operator: Liability for Surface Damage*, MCGILL U. INST. AIR & SPACE L., <https://www.mcgill.ca/iasl/files/iasl/ASPL636-Surface-Damage-Liability.pdf> [<https://perma.cc/58MX-3E8L>].

⁴⁰ Dempsey, *supra* note 39, at 12 (It “covers liability for third party damages caused by an aircraft on an international flight, but not arising as a result of unlawful interference. It seeks to replace the Rome Convention by providing strict liability for compensation of victims.”).

⁴¹ *Id.* (It “provides compensation to individuals suffering damages as a result of unlawful interference of aircraft and establishes a supplementary compensation mechanism for damages incurred beyond the limits on liability contained in the new Convention.”).

⁴² See ICAO, *List of Parties—Convention on Compensation for Damage to Third Parties Resulting From Acts of Unlawful Interference Involving Aircraft*, http://www.icao.int/secretariat/legal/List%20of%20Parties/2009_UICC_EN.pdf [<https://perma.cc/9E2N-WS8C>] (explaining that according to Article 40, the Convention on Compensation for Damage to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft (ICAO Doc 9920) requires ratification, acceptance, approval, or accession on condition of thirty-five states for its entry into force. There are currently eleven signatures, one ratification, and three accessions to the convention.); ICAO, *List of Parties—Convention on Compensation for Damage Caused by Aircraft to Third Parties*, http://www.icao.int/secretariat/legal/List%20of%20Parties/2009_GRC_EN.pdf [<https://perma.cc/A5UT-8CZ8>] (explaining that the Convention on Compensation for Damage Caused by Aircraft to Third Parties is to enter “into force on the sixtieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession.” There are currently thirteen signatures, two ratifications and five accessions to the convention.).

⁴³ *Status Report: Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, PAC. ISLANDS LEGAL INFO. INST., http://www.pacii.org/pits/en/status_pages/1952-3.html [<https://perma.cc/33FX-KR7S>].

⁴⁴ *Id.*

ratify the Montreal Protocol.⁴⁵ Although these conventions are only applicable to international air carriage,⁴⁶ based on the application of international conventions on liability to domestic air carriages in Nigeria, it can conveniently be assumed that these conventions would be adjusted to apply to domestic carriage upon ratification.

III. EXAMINATION OF THE LEGAL REGIME OF AIR CARRIER LIABILITY AND THE COMPENSATION REGIME IN NIGERIA

The domestic legal regime of aviation liability in Nigeria consists of international conventions (most notably the Montreal Convention), the Civil Aviation Act, and regulations on liability put in place by authorized agencies.⁴⁷ According to the National Civil Aviation Policy, “the Civil Aviation Act . . . together with regulations made by the [Nigerian Civil Aviation Authorities] NCAA constitutes the primary law regulating civil aviation in Nigeria.”⁴⁸ Regulations concerning liability of air carriers are the Consumer Protection Regulations contained in Part 19 of Nigeria Civil Aviation Regulations 2015.⁴⁹ These regulations are crucial to the issue of liability as they fill some of the gaps left in the Montreal Convention and the Civil Aviation Act. For instance, the Montreal Convention and the Civil Aviation Act do not provide for cases of denied boarding or flight cancellation, but these situations are contemplated by the Consumer Protection Regulations.⁵⁰

Nevertheless, victims of air disasters can make claims under the law of torts because most air disasters give rise to tortious liability. Although it has been observed that most personal injury claims in Nigeria are based on the common law with no statutory framework regarding compensation for personal inju-

⁴⁵ Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface pmbl., *opened for signature* Oct. 7, 1952, 310 U.N.T.S. 181 (The convention was adopted to “ensure adequate compensation for persons who suffer damage by injury caused by foreign aircraft while limiting in a reasonable manner the extent of liabilities incurred for such damage in order not to hinder the development of international air transport.”).

⁴⁶ See ICAO, *Status of Nigeria with Regard to International Air Law Instruments*, *supra* note 19.

⁴⁷ See generally Montreal Convention, *supra* note 9; Civil Aviation Act (Nigeria), *supra* note 17; National Civil Aviation Policy (2013), pts. 1–10 (Nigeria).

⁴⁸ National Civil Aviation Policy (2013), *supra* note 47, pt. 2.7, pmbl.

⁴⁹ See Nigeria Civil Aviation Regulations (2015), *supra* note 10, pt. 19.

⁵⁰ *Id.* pt. 19.4.

ries (except for employment injuries),⁵¹ legislation establishing tortious liability does exist from which claims for damage arising from air carriages can be made.⁵² Liability also arises from the contractual relationship between air operators and passengers, and criminal laws in Nigeria impose liability for accidents and death.⁵³

A. THE CIVIL AVIATION ACT

The Civil Aviation Act is the main legislation regulating aviation in Nigeria. It makes express provisions for liability in air carriages and it domesticates the Montreal Convention.⁵⁴ Section 48 of the Civil Aviation Act is quite instructive as it extends the applicability of the Montreal Convention to cover domestic carriages.⁵⁵ The Civil Aviation Act adopts the Montreal Convention in Schedule II and modifies it to fit domestic air carriages in Schedule III.⁵⁶ Therefore, it is typical to refer to the Montreal Convention when discussing liability under the Civil Aviation Act. The provisions of the Civil Aviation Act, with respect to liability, are discussed below.

1. *Damage Sustained in the Case of Death or Bodily Injury of a Passenger*

The Civil Aviation Act provides that “[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident [that] caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”⁵⁷ While the word “accident” is not defined in the Montreal Convention, the most widely adopted interpretation is the one enunciated by the U.S. Supreme Court in *Saks v. Air France*.⁵⁸ Under this definition, an accident is an “unexpected or unusual event or happening that is external to the passenger.”⁵⁹

⁵¹ Oluwakemi Adekile, *Compensating Victims of Personal Injury in Tort: The Nigerian Experience So Far*, 9 ACTA UNIVERSITATIS DANUBIUS. JURIDICA 144, 158 (2013).

⁵² See generally Civil Aviation Act (Nigeria), *supra* note 17, sched. III.

⁵³ See *id.* § 54, sched. III, arts. 9, 11(1).

⁵⁴ *Id.* sched. III, art.1(1).

⁵⁵ *Id.*

⁵⁶ *Id.* sched. II, sched. III, art. 1(1).

⁵⁷ *Id.* sched. III, art. 17.

⁵⁸ 470 U.S. 392 (1985).

⁵⁹ *Id.* at 394. The case was decided under the Warsaw Convention regime. *Id.* The plaintiff, Ms. Saks, was a passenger on an Air France flight from Paris to Los Angeles. *Id.* She “felt severe pressure and pain in her left ear” while the aircraft

The Civil Aviation Act, as an adaptation of the Montreal Convention, makes the carrier liable only for bodily injury, not for mental injury unaccompanied by physical injury.⁶⁰ This means that a passenger can only recover for mental injury if such injury accompanies bodily injury.⁶¹ In *Ehrlich v. American Airlines*, which has been cited as authority for the history and enactment of the Montreal Convention,⁶² the court embraced the approach that recovery for mental injury is restricted to that which flows from, or is caused by, bodily injury.⁶³ The Civil Aviation Act, in line with the Montreal Convention, establishes a two-tier liability sys-

descended to land in Los Angeles. *Id.* Shortly thereafter, Ms. Saks “consulted a doctor who concluded that she had become permanently deaf in her left ear.” *Id.* Ms. Saks then filed suit in a California state court. *Id.* Air France argued that Ms. Saks could not prove that her injury was caused by an accident within the meaning of Article 17 because the evidence indicated that the pressurization system had operated in a normal manner. *Id.* at 395. Air France also argued that the suit should be dismissed because the only alleged cause of the injury was “the normal operation of a pressurization system,” which therefore “could not qualify as an ‘accident.’” *Id.* The case was removed to a federal district court, which defined “accident” as an “unusual or unexpected happening.” *Id.* The court ruled that Ms. Saks could not recover under Article 17 because she could not demonstrate some malfunction or abnormality in the aircraft’s operation. *Id.* The court of appeals reversed, holding that the language, history, and policy of the Warsaw Convention and the Montreal Agreement impose absolute liability on airlines for injuries proximately caused by the risks inherent in air travel and that “normal cabin pressure changes qualify as an accident” within the meaning of the Warsaw Convention. *Id.* at 396. According to the appellate court, an accident is “an occurrence associated with the operation of aircraft [that] takes place between the time any person boards the aircraft with the intention of flight and all such persons have disembarked.” *Id.* The U.S. Supreme Court reversed the court of appeal’s decision and held that “liability under Article 17 of the Warsaw Convention arises only if a passenger’s injury is caused by an unexpected or unusual event or happening that is external to the passenger.” *Id.* at 405.

⁶⁰ During deliberations of the Montreal Convention, it was proposed that recovery for mental injury ought to be permitted along with physical injury. It was argued that about half of the passengers on any given flight usually experience a fear of flying and, if mental injury were included as a separate compensable of Article 17, it would lead to escalated claims and would be highly prejudicial to the interests of air carriers. See ICAO, *Minutes of the International Conference on Air Law (Convention for the Unification of Certain Rules for International Carriage by Air)*, at 69, 73, ICAO Doc. 9775-DC/2 (May 10–28, 1999).

⁶¹ See Montreal Convention, *supra* note 9, art. 17.

⁶² *Kruger v. United Airlines, Inc.*, 481 F. Supp. 2d 1005, 1008 (N.D. Cal. 2007).

⁶³ *Ehrlich v. Am. Airlines*, 360 F.3d 366, 401 (2d Cir. 2004). “The accident occurred before ratification of the Montreal Convention, leaving Warsaw as the governing authority. . . . [However, the court] address[ed] whether and how the Montreal Convention might apply.” McKay Cunningham, *The Montreal Convention: Can Passengers Finally Recover for Mental Injuries?*, 41 VAND. J. TRANSNAT’L L. 1043, 1078–79 (2008).

tem by which a carrier is strictly liable to compensate each passenger who suffers death or bodily injury US\$100,000.⁶⁴ The carrier may be liable for a higher amount if the plaintiff proves that the “damage was due to . . . negligence or other wrongful act or omission of the carrier or its servants or agents.”⁶⁵

Article 28 of the Montreal Convention provides that the carrier shall make advance payment to persons entitled to compensation if required by its national law. In Nigeria, Section 48(3) of the Civil Aviation Act provides:

In any case of aircraft accident resulting in death or injury of passengers, the carrier shall make advance payments of at least US\$30,000 (thirty thousand United States Dollars) within 30 (thirty) days from the date of such accident . . . to such natural persons who are entitled to claim compensation in order to meet [their] immediate economic needs . . . Such advance payments shall not constitute recognition of liability and may be off set against any amounts subsequently paid as damages by the carrier.⁶⁶

The Civil Aviation Act prescribes a two-year limitation period after which the right to damages will be extinguished.⁶⁷

Recent events in Nigeria have revealed the challenges faced by claimants in receiving compensation for death and bodily injury. In June 2012, a major air accident involving Dana Airlines caused the death of the 147 passengers and six crew members on board.⁶⁸ Two years after the accident, many families of victims reportedly had yet to receive any compensation from the airline.⁶⁹ In 2005, 109 of 110 passengers died in an accident involving Sosoliso Airlines, and 103 of 106 passengers died in an accident involving ADC airlines.⁷⁰ As of 2010, compensation was

⁶⁴ Civil Aviation Act (Nigeria), *supra* note 17, sched. III, art. 21.

⁶⁵ *Id.*

⁶⁶ *Id.* § 48(3).

⁶⁷ *Id.* sched. III, art. 35.

⁶⁸ ACCIDENT INVESTIGATION BUREAU NIGERIA, *supra* note 5.

⁶⁹ Monsuru Olowoapejo, *Dana Crash: Two Years After, Relatives Wail, Await Compensation*, VANGUARD (June 3, 2014), <http://www.vanguardngr.com/2014/06/dana-crash-two-years-relatives-wail-await-compensation/> [https://perma.cc/7YRC-B7ND].

⁷⁰ *Sosoliso, ADC Plane Crashes, Final Compensation this Week—DG NCAA*, NBF NEWS (Dec. 13, 2010), <http://www.nigerianbestforum.com/blog/sosoliso-adc-plane-crashes-final-compensation-this-week-dg-ncaa/> [https://perma.cc/L7K8-NLYP].

still outstanding to some families of victims involved in these accidents.⁷¹

The failure of air carriers to comply with compensation provisions usually results in class action lawsuits against the air carriers by families of victims. Families of the victims of the Dana Airline plane crash of 2012 instituted actions in 2014, at which time a considerable number of persons entitled to advance payments were still unpaid.⁷² It is notable that prior to this, beneficiaries in Nigeria rarely instituted actions against air carriers for this purpose as “families are often too overwhelmed by the loss of their loved ones to challenge the actions of the carriers in courts.”⁷³

2. *Liability for Damage Sustained in Case of Destruction or Loss of Baggage or Cargo*

The Civil Aviation Act provides that:

[T]he air carrier is liable for damage sustained in case of destruction or loss of, or damage to checked baggage [if] the event [that] caused the destruction, or loss or damage[,] took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier.⁷⁴

However, the carrier is not liable if the damage was caused by a defect or attribute of the baggage.⁷⁵ For carry-on baggage, the carrier is liable only if the carrier or one of its servants or agents caused the damage.⁷⁶

With regard to cargo, the carrier is liable for damage, destruction, or loss of cargo only if the cause of the damage occurred during the carriage by air.⁷⁷ The Court of Appeal in *Emirate Airline v. Tochukwu Aforka & Anor* stated that the carriage by air consists of the period during which the cargo is in the charge of

⁷¹ *Id.*

⁷² *Dana Air Crash: Consortium of Lawyers Breaks New Grounds in Aviation Litigation*, BUS. DAY (June 25, 2015), <http://businessdayonline.com/2015/06/dana-air-crash-consortium-of-lawyers-breaks-new-grounds-in-aviation-litigation/> [https://perma.cc/2T65-YLER].

⁷³ *Id.* The dearth of precedent in this area also points to this fact.

⁷⁴ Civil Aviation Act (Nigeria), *supra* note 17, sched. III, art. 17.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* sched. III, art. 18.

the carrier.⁷⁸ Thus, it does not matter whether the cargo has been air lifted.⁷⁹ However, under the Civil Aviation Act,

The carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from inherent defect, quality[,] or vice of that cargo; defective packing of that cargo performed by a person other than the carrier or its servants or agents; an act of war or an armed conflict; [or] an act of public authority carried out in connection with the entry, exit or transit of the cargo.⁸⁰

The compensation available to a passenger in the case of destruction, loss, or damage in the carriage of baggage is limited to US\$20 per kilogram, or US\$1,000, “unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.”⁸¹ If a declaration is made, the carrier will be liable to pay, at maximum, the declared sum, unless the carrier shows that the declared sum is greater than the passenger’s valuation of the baggage.⁸²

These limitations are inapplicable if the carrier or its agents intended to cause loss or damage, or if the loss or damage was done recklessly with the knowledge that loss or damage could result.⁸³ This provision is similar to Article 25(1) of the Warsaw Convention, which provided that “[t]he carrier shall not be entitled to exclude or limit his liability if the damage is caused by his wil[l]ful misconduct.”⁸⁴ The Second Circuit has held that willful misconduct means an intentional act that causes damage.⁸⁵ In *American Airlines v. Ulen*, the court held that a willful act done with the knowledge that the act was likely to result in injury to a passenger constituted willful misconduct.⁸⁶ In *Horabin v. British Overseas Airway Corporation*, the court held that “to be guilty of wil[l]ful misconduct, the person concerned must appreciate that he is acting wrongfully, or is wrongfully omitting to act, and yet persists in so acting or omitting to act regardless of the con-

⁷⁸ *Emirate Airline v. Tochukwu Aforka & Anor*, (2014) LPELR-22686 (CA) (Nigeria).

⁷⁹ *Id.*

⁸⁰ Civil Aviation Act (Nigeria), *supra* note 17, sched. III, art. 18.

⁸¹ *Id.* art. 22(2).

⁸² *Id.*

⁸³ *Id.* art. 22(5).

⁸⁴ Warsaw Convention, *supra* note 18, art. 25.

⁸⁵ *See Pekelis v. Transcon. & W. Air, Inc.*, 187 F. 2d 122, 124 (2d Cir. 1951).

⁸⁶ *Am. Airlines v. Ulen*, 186 F. 2d 529, 533 (D.C. Cir. 1949).

sequences, or acts or omits to act with reckless indifference as to what the result may be.”⁸⁷ The Nigerian Court of Appeal in *Harka Air Services Limited v. Keazor* said an act that constitutes willful misconduct relates to proof of a conscious intent to do, or omit doing, an act from which harm to another results.⁸⁸ Therefore, willful misconduct is an intentional omission of a manifest duty to which there must be a realization of the probability of injury from the conduct and a disregard of the probable consequence of such conduct.

3. *Liability for Delay of Persons, Baggage, or Cargo*

The Civil Aviation Act, in consonance with the Montreal Convention, does not provide a strict liability regime for damages resulting from delay.⁸⁹ The Civil Aviation Act provides that the carrier is liable for damage to passengers, baggage, or cargo caused by delay, but the carrier is not liable for damage caused by delay if it can show that it, and its servants and agents, took all reasonably required measures to avoid the damage or that such required measures were impossible to take.⁹⁰

The Civil Aviation Act does not define the term “delay,” neither does the Montreal Convention nor the earlier Warsaw Convention.⁹¹ The drafters of the Montreal Convention intended “to leave the nature of the ‘delay’ for which the carrier will be liable . . . to be determined by the courts on a case-by-case basis.”⁹² The delay visualized by the Civil Aviation Act must be that which occurs in the carriage by air. That is, the period after the contract of carriage has been concluded, when the flight ticket is purchased, and before the end of the air carriage, when the aircraft lands at its destination.⁹³ Therefore, delay can occur even before the arrival of the passenger at the airport when a text message is received notifying the passenger of a flight delay. A delay can also occur upon arrival at the airport before boarding, or even after boarding if the aircraft does not depart on time. Delay can also occur when the aircraft is en

⁸⁷ Guiseppe Guerreri, *Wilful Misconduct in the Warsaw Convention: A Stumbling Block?*, 6 MCGILL L.J. 267, 272 (1960) (quoting *Horabin v. BOAC* (1952) 2 All ER 1006 (Nigeria)).

⁸⁸ *Harka Air Servs. (Nig.) Ltd. v. Keazor* [2011] 2 CLRN 216 (Nigeria).

⁸⁹ See generally Civil Aviation Act (Nigeria), *supra* note 17, sched. III, art. 19.

⁹⁰ *Id.*

⁹¹ See *id.*

⁹² TOMPKINS, *supra* note 22, at 227.

⁹³ *Id.* at 229.

route or when it is landing.⁹⁴ In essence, a flight delay is a change from the promised time or date of arrival or departure of the aircraft.

The compensation from the carrier to each passenger “in the case of damage caused by delay . . . is limited to [US\$]4,150.”⁹⁵ The compensation available to a passenger in the case of delay in the carriage of baggage “is limited to [US\$]1,000 . . . unless the passenger, when checking in the baggage, made a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires.”⁹⁶ Thus, “the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger’s actual interest in delivery at destination,” as previously explained.⁹⁷ Recovery for damages is linked to consequential loss, so there must be a causal link between the delay and the damage sustained.⁹⁸ The Civil Aviation Act is silent on the measure of damages for delay, so it is left to the court to decide.⁹⁹ However, compensable damage must be established—the cost of accommodation, transportation, or another compensable damage—that would not have been incurred but for the delay.¹⁰⁰

The determining factor of whether the air carrier is liable is not what caused the delay, but whether the air carrier took all necessary and reasonable measures to avoid the delay.¹⁰¹ However, if the delay is “caused or contributed to by the negligence or wrongful act or omission” of the passenger, then the “air carrier shall be wholly or partly exonerated from its liability.”¹⁰² This provision is detrimental to passengers because it means that no matter the cause of the delay, if the air carrier can prove that it did everything that could reasonably be done to prevent the delay, then the air carrier will not be held liable. The court refused to hold a carrier liable “where delay was caused by a

⁹⁴ *Id.*

⁹⁵ Civil Aviation Act (Nigeria), *supra* note 17, sched. III, art. 22(1).

⁹⁶ *Id.* sched. III, art. 22(2).

⁹⁷ *Id.*

⁹⁸ See I.H. PH. DIEDERITES-VERSCHOOR, AN INTRODUCTION TO AIR LAW 141 (8th ed. 2006); TOMPKINS, *supra* note 22, at 228–29.

⁹⁹ See TOMPKINS, *supra* note 22, at 229–30; see generally Civil Aviation Act (Nigeria), *supra* note 17.

¹⁰⁰ See TOMPKINS, *supra* note 22, at 237.

¹⁰¹ See Civil Aviation Act (Nigeria), *supra* note 17, sched. III, arts. 19, 22(2).

¹⁰² *Id.* sched. III, art. 20.

technical defect of the aircraft” in *Martel v. Air France*.¹⁰³ The carrier “had relied on the fact that according to the manufacturer’s instructions for operation, the hydraulic equipment of an Airbus had to be checked only after 230 hours” of flight; however, the pump in question had broken down at takeoff only after 179 hours.¹⁰⁴ The court “considered this a case of *force majeure*” and held that because the carrier took reasonable measures, it was not liable for the delay.¹⁰⁵

Delay caused by external factors cannot give rise to liability on the part of the carrier.¹⁰⁶ However, if the act that caused delay is carried out regularly or routinely,¹⁰⁷ then the carrier will be liable because the carrier must ensure that reasonable measures are taken to avoid the delay.¹⁰⁸ The burden is on the airline to prove that it took all reasonable measures to avoid the delay or that it was not possible to take such measures.¹⁰⁹ In situations like this, it is not sufficient for an airline to offer general reasons such as “technical failure,” “bad weather,” “crew problems,” or “cleaning.”¹¹⁰ The carrier must provide details of the delay and offer evidence that the carrier took all reasonable measures to prevent the delay before the burden can be discharged.¹¹¹ This provision gives the carrier some control over determining its liability. Apart from unfavorable weather conditions, air carriers in Nigeria usually attribute flight delays to technical faults that they

¹⁰³ Cour d’appel [CA] [regional court of appeal] Aix-en-Provence, 1984 RFDA 298; DIEDERITES-VERSCHOOR, *supra* note 100, at 136–37.

¹⁰⁴ DIEDERITES-VERSCHOOR, *supra* note 100, at 137.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ For instance, customs authorities carrying out an inspection cannot give rise to liability on the part of the carrier as the carrier cannot take measures to avoid damage by delay in that circumstance. DIEDERITES-VERSCHOOR, *supra* note 100, at 137. This is because the customs authorities are not agents or servants of the air carrier. *Id.* However, if such measures are carried out regularly or routinely by the authorities, the carrier will be liable because it must ensure that it takes reasonable measures to avoid delay; for example, it should have started the check-in and security checks early enough so as to complete the process on time, thereby avoiding the delay. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ NORDIC COUNCIL OF MINISTERS, THE RIGHTS OF AIR PASSENGERS IN THE EVENT OF DELAYS AND CANCELLATIONS 15 (2002) (Den.).

¹¹⁰ *Id.*

¹¹¹ The National Board for Consumer Complaints in Sweden has, in several cases where an airline has referred to “technical failure” without specifying the term in more detail, “judged the airline to be liable as the airline did not provide sufficient reason to consider that the airline has fulfilled its burden of proof in accordance with chapter 9, section 20 of the Swedish Aviation Act.” *Id.*

took all reasonable measures to avoid.¹¹² However, it has been noted that delay in the arrival of the incoming aircraft often occurs as a result of the common practice of airlines to operate flights within very tight schedules, resulting in small time margins for crews to transfer from one flight to the other.¹¹³

To give rise to carrier liability, the delay must last for a certain length of time, but the Civil Aviation Act is silent on the precise length of such delay.¹¹⁴ Shawcross and Beaumont suggest that deference is to be made to “the common law rule that, in the absence of any express contract, a carrier is only bound to perform the carriage within a reasonable time.”¹¹⁵ The Consumer Protection Regulations, which are discussed *infra*, impose obligations on air carriers for delay more than two hours after the scheduled flight time.¹¹⁶

4. *Liability of Air Carriers to Third Parties*

The Civil Aviation Act provides strict liability for air carriers where injury, loss, or damage occurs to any person or property, on land or water, by an article or a person in, or falling from, an aircraft while in flight, taking off, or landing.¹¹⁷ This applies to all aircraft and not only those in the course of domestic transportation.¹¹⁸ The provision expressly states:

Where injury, loss[,] or damage is caused to any person or property on land or water by an article or a person in or falling from an aircraft while in flight, taking off[,] or landing, then, without prejudice to the law relating to contributory negligence, damages in respect of the injury, loss or damage shall be recoverable without proof of negligence or intention or any other cause of action, as if the injury, loss[,] or damage had been caused by the wilful [sic] act, neglect[,] or default of the owner of the aircraft.¹¹⁹

The Civil Aviation Act does not, however, specify the amount of liability; it also does not state the extent of liability, that is,

¹¹² *Id.*

¹¹³ *Id.* at 14.

¹¹⁴ Civil Aviation Act (Nigeria), *supra* note 17, sched. III, art. 19.

¹¹⁵ 1 SHAWCROSS AND BEAUMONT: AIR LAW § 1002 (J. David McClean et al. eds., 2015).

¹¹⁶ See discussion *infra* Section III.B. The regulations regulate the responsibilities and obligations of air carriers to passengers where there is a delay of thirty minutes or more. Nigeria Civil Aviation Regulations (2015), *supra* note 10, pts. 19.6.1, 19.6.1.1.

¹¹⁷ Civil Aviation Act (Nigeria), *supra* note 17, § 49(2).

¹¹⁸ See *id.*

¹¹⁹ *Id.*

whether liability is unlimited.¹²⁰ The issue of liability for third parties has been highly contentious since the time of the Rome Convention.¹²¹ Under the Montreal Convention, liability with respect to loss of life or personal injury is limited to US\$33,200 per person killed or injured.¹²² A cap was placed on the liability of carriers for a single incident based on the weight of the aircraft.¹²³ The Montreal Convention, however, did not garner much support from states, and the greatest source of dissatisfaction with the Montreal Convention was the liability limits.¹²⁴ The *Study on the Modernization of the Rome Convention of 1952* (dated November 1, 2002),¹²⁵ which was conducted by the International Civil Aviation Organization Secretariat, revealed that a majority of states preferred keeping liability limits at higher levels while other states were opposed to limitation altogether.¹²⁶ One reason that there has not been any agreement on the extent of liability is that states have said that “the subject matter is currently covered by domestic unlimited, fault-based liability regimes.”¹²⁷ Many states, however, have said that they would “support a liability regime similar to that adopted in the Montreal Convention of 1999, a two-tier system with a strict liability regime up to a set limit, with unlimited liability above the threshold based on presumed fault of the carrier.”¹²⁸

The study also indicated that non-member States to the Rome Convention were “generally satisfied with their domestic regimes, whether they featured limited or unlimited liability.”¹²⁹ Recall that Nigeria ratified the Rome Convention, but denounced it in 2002.¹³⁰ While the Civil Aviation Act imposes strict liability on carriers, it does not specify the amount of liability.¹³¹

¹²⁰ See *id.*

¹²¹ Michael Jennison, *Rescuing the Rome Convention of 1952: Six Decades of Effort to Make a Workable Regime for Damage Caused by Foreign Aircraft to Third Parties*, 10 UNIFORM L. REV. 785 (2005).

¹²² *Id.* at 788. This amount was increased by the Montreal Protocol to 125,000 SDR, which is approximately US\$185,000.

¹²³ *Id.* at 787.

¹²⁴ *Id.* at 788–89.

¹²⁵ This was a summary of the results of responses to the questionnaire, which canvassed States’ views on the 1952 Rome Convention, its amending Protocol, prospects for wider acceptance, and the need for modernization. *Id.* at 790.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 795.

¹³⁰ *Id.* at 789.

¹³¹ See Civil Aviation Act (Nigeria), *supra* note 17, § 49(2).

Thus, it is difficult to say that the regime for damage to third parties in Nigeria is adequate in light of the above provisions of the Civil Aviation Act that do not include liability limits.

Events within the country have shown that obtaining compensation from air carriers for third party liability is onerous.¹³² Since air carriers usually give priority to injured passengers over third parties, it can be assumed that third parties may not receive compensation until the claims of the passengers or their beneficiaries are settled.¹³³ Taking the Dana Airline crash of 2012 as an example, the carrier has yet to pay compensation to some passengers and their beneficiaries as of the time of writing this article.¹³⁴ Compensation remained unpaid for a year to some of the residents of Lagos who suffered injuries and loss of property and to the families of those who lost their lives.¹³⁵ Some residents who suffered injuries and loss of property as a result of the crash were forced to relocate to the Lagos State Emergency Management Agency (LASEMA) relief camp, where they lived for a few months.¹³⁶

B. CONSUMER PROTECTION REGULATIONS IN PART 19 OF THE NIGERIAN CIVIL AVIATION REGULATIONS

The Consumer Protection Regulations are a part of the Nigerian Civil Aviation Regulations. They provide for temporal and monetary care obligations on the part of the carrier to the passengers in the event of certain mishaps.¹³⁷ The Consumer Protection Regulations address issues such as “compensations for denied boarding, delays[,] and cancellation of flights.”¹³⁸ It makes provisions for the minimum rights of passengers and obli-

¹³² See Ramon Oladimeji, *Dana Aircrash: Court Hears Victims’ N579m Suit Dec. 12*, NIGERIA BAR (Oct. 5, 2015), <http://www.nigeriabar.com/2015/10/dana-aircrash-court-hears-victims-rsquo-n579m-suit-dec-12#.VqmKQtL2a70> [https://perma.cc/TM37-YKRF]; Olowoopejo, *supra* note 69.

¹³³ See Daniel Eteghé, *Wicked Dana Crash: ‘We Watched as Passengers Struggled to Come Out of Burning Plane’*, PARADIGM (June 8, 2014, 12:04 PM), <http://www.theparadigmng.com/2014/06/08/wicked-dana-crash-we-watched-as-passengers-struggled-to-come-out-of-burning-plane/> [https://perma.cc/9URZ-4NDV].

¹³⁴ An action had since been instituted against the carrier, and the matter went for another hearing in June 17, 2015. It was, however, adjourned until October 21, 2015. *Id.*; see *Dana Air Crash: Consortium of Lawyers Breaks New Grounds in Aviation Litigation*, *supra* note 72.

¹³⁵ Eteghé, *supra* note 133.

¹³⁶ Olowoopejo, *supra* note 69.

¹³⁷ See generally Nigeria Civil Aviation Regulations (2015), *supra* note 10, pt. 19.

¹³⁸ *Id.* at intro.

gations of air carriers.¹³⁹ The compensation provided under these regulations is supplementary to similar compensation under the Civil Aviation Act.¹⁴⁰

1. *Denied Boarding*

While recognizing that an “air carrier may overbook a scheduled flight in contemplation of the possibility of some passengers not showing up for that flight,”¹⁴¹ the regulations also envisage that some passengers may be denied boarding in a situation when all passengers eventually show up.¹⁴² In such situations, the carrier must “ensure that the smallest practicable number of persons holding confirmed and reserved seats on that flight are involuntarily denied boarding.”¹⁴³ The carrier is to “request for volunteers for denied boarding before applying boarding priority.”¹⁴⁴ Where there are insufficient volunteers, the carrier can deny some passengers boarding,¹⁴⁵ and it must take boarding priority factors into consideration while doing this.¹⁴⁶

In cases of denied boarding, there are two classes of passengers affected: the first are passengers who volunteer for denied boarding or who give up their confirmed reserved space on the aircraft; the second are passengers who are denied boarding involuntarily or who are not willing to give up their confirmed reserved space on the aircraft but are required to do so based on the application of boarding priority.¹⁴⁷ Both classes of passengers are to be offered compensation according to the Consumer Protection Regulations.¹⁴⁸

¹³⁹ *Id.* pt. 19.1.1.

¹⁴⁰ *See* Civil Aviation Act (Nigeria), *supra* note 17, § 30(5).

¹⁴¹ *See* Nigeria Civil Aviation Regulations (2015), *supra* note 10, pt. 19.3.2.

¹⁴² *See id.* pt. 19.4.1.

¹⁴³ *See id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* pt. 19.5.3.

¹⁴⁶ *Id.* pt. 19.5.2. These factors “include, but are not limited to, the following: (i) passengers on urgent medical trips; (ii) a passenger’s time of check-in; (iii) whether a passenger has a seat assignment prior to boarding; (iv) the fare paid by a passenger; (v) a passenger’s frequent-flyer status; (vi) a passenger’s reduced mobility status, including unaccompanied minors; [and] (vii) [f]amilies (maximum of two adults) where at least one child is aged five years or under.”

¹⁴⁷ *See id.* pt. 19.4.2.

¹⁴⁸ *See id.* pt. 19.5.4.

A passenger who volunteers for denied boarding is entitled to receive at least 25% of the fare or passenger ticket price,¹⁴⁹ which shall be paid in cash or other means specified in the Consumer Protection Regulations.¹⁵⁰ The passenger shall also be provided with a choice to either receive:

- (i) [an] immediate reimbursement in cash . . . of the full cost of [the] unutilized ticket at the price at which it was bought . . . ;
- (ii) re-routing, under comparable transport conditions, to their final destination at the earliest opportunity; or
- (iii) re-routing, under comparable transport conditions, to their final destination at a later date at the passenger's convenience, subject to availability of seats.¹⁵¹

While a passenger who is denied boarding involuntarily is entitled to all the compensation given to passengers who are denied boarding voluntarily, they are also entitled to additional compensation, referred to as assistance, specified in parts 19.10, 19.11, and 19.12 of the regulations.¹⁵² Under these sections, such passenger is entitled to “refreshments such as water, soft drinks, confectioneries/snacks; a meal; hotel accommodation; transport between the airport and place of accommodation (hotel or other accommodation) . . . [and] two telephone calls, SMS[,] or emails.”¹⁵³

2. *Delay of Persons*

Under the regulations, when an operating air carrier reasonably expects a flight to be delayed beyond its scheduled time of departure, it shall provide the passengers with reason(s) for the delay within thirty minutes after the scheduled departure time.¹⁵⁴ It shall also provide the passengers with the assistance specified in the Consumer Protection Regulations.¹⁵⁵ After two hours, the carrier must provide passengers with refreshments and telephone calls, SMS, and emails.¹⁵⁶ If the delay is beyond two hours, the regulations instruct that:

¹⁴⁹ *Id.* pt. 19.8.1. It should be noted that this applies only to flights within Nigeria; international flights, according to the regulations, attract 30% of the passenger ticket price.

¹⁵⁰ *Id.* pt. 19.8.3.

¹⁵¹ *Id.* pt. 19.9.1.

¹⁵² *See id.* pt. 19.5.4.

¹⁵³ *Id.* pts. 19.10.1, 19.10.2.

¹⁵⁴ *Id.* pt. 19.6.1.1.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

[The air carrier] must reimburse passengers of the full cost of unutilized ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if the flight is no longer serving any purpose in relation to the passenger's original travel plan, together with, when relevant, a return flight to the first point of departure, at the earliest opportunity.¹⁵⁷

If the delay occurs between the hours of 10:00 PM and 4:00 AM or "at a time when the airport is closed at the point of departure or final destination," the carrier is to provide hotel accommodation as well as transport between the airport and place of accommodation.¹⁵⁸ The Consumer Protection Regulations do not provide for other monetary compensation in the event of a flight being delayed.¹⁵⁹

3. Cancellation

Where a flight is canceled, the air carrier must offer passengers assistance similar to that offered for delays; that is, after two hours passengers must be provided with refreshments and reimbursements, as discussed above.¹⁶⁰ Passengers are entitled to hotel accommodation and transport between the airport and place of accommodation if the cancellation is after 10:00 PM and before 4:00 AM or "at a time when the airport is closed at the point of departure or final destination."¹⁶¹ However, passengers will not have this right if "they are informed of the cancellation at least twenty-four hours before the scheduled time of departure."¹⁶²

Passengers whose flights are canceled are entitled to the same reimbursement and re-routing as passengers who encounter delays of two hours or more.¹⁶³ Where a re-routing is to take place and the new flight is "reasonably expected" to depart at least a day after the originally scheduled departure, passengers are to be provided with "re-routing under comparable transport conditions to their final destination at the earliest opportunity; or re-routing, under comparable conditions, to their final destination

¹⁵⁷ *Id.* pt. 19.9.9(ii).

¹⁵⁸ *Id.* pt. 19.6.1.1(iii).

¹⁵⁹ *See id.* pt. 19.6.1.1.

¹⁶⁰ *Id.* pt. 19.7.1(i).

¹⁶¹ *Id.*

¹⁶² *Id.* pt. 19.7.1(iii).

¹⁶³ *See id.* pts. 19.7.1(ii), 19.9.1(i).

at a later date at the passenger's convenience, subject to availability of seats."¹⁶⁴

The Consumer Protection Regulations require that "[w]hen passengers are informed of the cancellation, an explanation shall be given concerning possible alternative transport."¹⁶⁵ A carrier is not "obliged to pay compensation for cancellation if it can prove that the cancellation is caused by extraordinary circumstances that could not have been avoided, even if all reasonable measures had been taken."¹⁶⁶ Compensation, according to the Consumer Protection Regulations, connotes "25% of the fares or passenger ticket price."¹⁶⁷ Extraordinary circumstances, according to the regulations, include natural disasters or air traffic control strikes and exclude technical problems identified during routine maintenance.¹⁶⁸ The regulations also place the burden of proof concerning any question as to whether and when the passenger has been informed of the cancellation of the flight upon the air carrier.¹⁶⁹

The U.K. Court of Appeal interpreted a similar provision on the cancellation of flights contained in EU Regulation No. 261/2004 in *Jet2.com Ltd. v. Huzar*.¹⁷⁰ In this case, the air carrier relied on the exception found in Regulation 261, which provides that an air carrier will not be obliged to pay compensation "if it can prove that the delay is caused by extraordinary circumstances [that] could not have been avoided even if all reasonable measures had been taken."¹⁷¹ The court interpreted this test in a narrow and strict manner, interpreting extraordinary circumstances to relate only to events falling outside of the control of the airline, such as terrorist acts or climate difficulties.¹⁷² The court stated that technical defects or problems in aircraft are inherent in the normal activity of an airline and, therefore, do not constitute unexpected flight safety shortcomings unless caused by events outside the activities of an airline, such as air

¹⁶⁴ *Id.* pts. 19.7.1(ii), 19.9.1(ii), 19.9.1(iii).

¹⁶⁵ *Id.* pt. 19.7.2.

¹⁶⁶ *Id.* pt. 19.7.3.

¹⁶⁷ *Id.* pt. 19.8.

¹⁶⁸ *Id.* pt. 19.7.3.

¹⁶⁹ *Id.* pt. 19.7.4.

¹⁷⁰ *Jet2.com Ltd. v. Huzar* [2014] EWCA (civ) 791, [2014] Bus. L. R. 1324 (Eng.), <http://www.bailii.org/ew/cases/EWCA/Civ/2014/791.html> [<https://perma.cc/Y63F-DHD7>].

¹⁷¹ *Id.* para. 8.

¹⁷² *See id.* paras. 47–48.

traffic service strikes or terrorist acts.¹⁷³ The court commented that a technical problem may be unforeseeable but that did not mean it was unexpected.¹⁷⁴

4. *Delayed, Lost, and Damaged Baggage*

Checked baggage should be carried on the same flight as the passenger who checked it in.¹⁷⁵ However, the law recognizes situations whereby this is deviated from “in consideration of safety, security, or any other legal and valid cause.”¹⁷⁶ In such a situation, the carrier must “inform the passenger at the soonest practicable time,” and it “shall carry the off-loaded baggage in the next flight with available space, and deliver the same to the passenger.”¹⁷⁷ “The air carrier shall immediately tender an amount . . . [of] five thousand naira (N5,000) to the passenger, as compensation for the inconvenience . . . experienced.”¹⁷⁸

Where any baggage, “whether carried on the same flight or a later flight, [gets] lost or suffer[s] any damage attributable to the air carrier, the passenger shall be compensated in accordance with the provisions of the Civil Aviation Act.”¹⁷⁹ “For compensation purposes, a passenger’s baggage is presumed to have been permanently and totally lost, if within a period of 7 (seven) days . . . counted from the time the passenger or consignee should have received same, the baggage is not delivered to the said passenger or consignee.”¹⁸⁰ “Refund of checked baggage fees will also apply, if the baggage is not delivered to the passenger within twenty-four (24) hours from the arrival of flight.”¹⁸¹

The Consumer Protection Regulations make provisions for complaints to be lodged with the Consumer Protection Direc-

¹⁷³ *See id.*

¹⁷⁴ *Id.* para. 42. The Supreme Court declined to hear an appeal because “the application does not raise a point of law of general public importance and in relation to the point of European Union law said to be raised by or in response to the application, it is not necessary to request the Court of Justice to give any ruling, because the court’s existing jurisprudence already provides sufficient answer.” *Permission to Appeal Decisions by UK Supreme Court: Flight Delay Compensation; Pay TV; Retailers in Administration*, THE SUPREME COURT (Oct. 31, 2014), <http://www.supremecourt.uk/news/flight-delay-compensation-pay-tv-retailers-in-administration.html> [<https://perma.cc/CY4R-KGEN>].

¹⁷⁵ Nigeria Civil Aviation Regulations (2015), *supra* note 10, pt. 19.17.1.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* pts. 19.17.2, 19.17.2.1.

¹⁷⁸ *Id.* pt. 19.17.2.1(i).

¹⁷⁹ *Id.* pt. 19.17.3.

¹⁸⁰ *Id.* pt. 19.17.3.1.

¹⁸¹ *Id.* pt. 19.17.4.

torate about an alleged infringement of the regulations.¹⁸² An assessment will be carried out, after which an assessment report will be made.¹⁸³ There is also a provision for administrative hearing procedures,¹⁸⁴ and “[e]very directive of the Authority shall be complied with within 30 days of it being issued.”¹⁸⁵ The Consumer Protection Regulations do not prevent passengers from exercising their rights under any other applicable law.¹⁸⁶ Thus, although the air carrier has performed its obligations as required under the Consumer Protection Regulations, the carrier still may be liable under any other law in Nigeria. However, a passenger who volunteers to be denied boarding is precluded from making a claim under any other law.¹⁸⁷

C. LEGISLATION ESTABLISHING LIABILITY FROM WHICH CLAIMS FOR DAMAGE ARISING FROM AIR CARRIAGES CAN BE MADE

There is other legislation in Nigeria, although not aviation based, upon which claims for injury arising from air carriages can be made.¹⁸⁸ Claims could be made pursuant to a breach of contract or under tort law. With the authority of *Otoakhia v. Aero Contractor Nigeria Limited*, however, it seems the Nigerian courts are indisposed to air carriage claims being made either under contract law or tort law.¹⁸⁹ The Court of Appeal affirmed the decision of the trial court and held that the appellant’s claim did not border on breach of contractual obligation but related to matters arising from aviation and safety of aircraft, stating as follows:

The law is that where domestic/common law right has been enacted into a statutory provision, it is to the statutory provision that resort must be had for such right, and not the domestic/common law. Hence an air passenger is not at liberty to choose as between the provisions of the convention and the domestic/common law, for claims for damages against the carrier. Such claims have to be asserted only in accordance with and subject to

¹⁸² *Id.* pt. 19.20.

¹⁸³ *Id.* pt. 19.24.1.

¹⁸⁴ *Id.* pt. 19.25.

¹⁸⁵ *Id.* pt. 19.25.15.

¹⁸⁶ *Id.* pt. 19.13.1.

¹⁸⁷ *Id.* pt. 19.13.2.

¹⁸⁸ See Lagos Fatal Accidents Law (1961) Cap. (F1), § 3(1) (Nigeria); Lagos Law Reform (Torts) Law (1961) Cap. (L64), § 7(3)(a) (Nigeria).

¹⁸⁹ See *Otoakhia v. Aero Contractor Nigeria Ltd.* [2014] LPELR-23319 (CA), 24 (Nigeria).

the terms and conditions of the convention and cannot be pursued under any other law.¹⁹⁰

However, contract and tort law continue to be relevant in air carriage claims. For example, courts in other jurisdictions use contract and tort law for claims relating to air carriage.¹⁹¹ While it has been observed that the international conventions governing air carrier's liability are favorable to injured persons, courts have too frequently retreated to traditional fault-based and causation-oriented tort analyses to resolve legal issues arising under the conventions.¹⁹² It must, however, be stated that these laws do not provide an adequate basis for air liability claims, as will be discussed *infra*.

1. *The Fatal Accidents Law*

Nigerian law provides for compensation where "the death of a person is caused by a wrongful act, neglect[,] or default," which would, assuming death did not occur, "have entitled the person injured to maintain an action and recover damages."¹⁹³ Under this law, "the person who would have been liable to an action for damages will still be liable to an action for damages notwithstanding the death of the person injured."¹⁹⁴

2. *Tort Law*

The occupier's liability law makes the occupier of premises liable for loss or injury suffered by those who lawfully come into the occupier's premises.¹⁹⁵ In Nigeria, the tort of occupier's liability is codified in the legislation of some states.¹⁹⁶ In other states, where there is no legislation on occupier's liability, the common law rules apply.¹⁹⁷

Section 7(3)(a) of the Lagos State Law Reform (Torts) Law provides that:

¹⁹⁰ *Id.*

¹⁹¹ See *Am. Airlines v. Wolens*, 513 U.S. 219, 228–29 (1995).

¹⁹² See GEORGE LELOUDAS, *RISK AND LIABILITY IN AIR LAW* 212 (2009).

¹⁹³ Lagos Fatal Accidents Law (1961), *supra* note 188.

¹⁹⁴ *Id.*

¹⁹⁵ Lagos Law Reform (Torts) Law (1961), *supra* note 188, § 7(1).

¹⁹⁶ Dennis U. Odigie & Emmanuel Owushi-Junior, *Occupier's Liability Law and Libraries*, NIGERIAN LAW GURU, <http://www.nigerianlawguru.com/articles/torts/OCCUPIER%20S%20LIABILITY%20LAW%20AND%20LIBRARIES.pdf> [https://perma.cc/32NL-HDKM].

¹⁹⁷ *Id.*

The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate . . . the obligations of a person occupying or having control over any fixed or movable structure, including any vessel, vehicle or aircraft.¹⁹⁸

Passengers on board the aircraft can be regarded as licensees and can establish liability against the air carrier being the occupier. Under this law, a claim can only arise from a tortious act on the part of the carrier since this law establishes tortious liability and not strict liability.¹⁹⁹ This means that to be entitled to damages, passengers must prove the fault of negligence on the part of the carrier.²⁰⁰

The historical antecedent of liability in international civil aviation shows that reliance cannot be placed on tort law to impose liability for damage suffered during air carriage.²⁰¹ It has been observed that the law of tort in Nigeria has, in the last five decades, rigidly adhered to the traditional theory that fault is a requisite to liability in negligence.²⁰² This makes it difficult to establish liability in tort for air disasters as opposed to the aviation liability regime that prescribes strict liability for some mishaps, such as death and personal injury.²⁰³ However, even where strict liability is not prescribed for delay, for instance, liability is

¹⁹⁸ Lagos Law Reform (Torts) Law (1961), *supra* note 188.

¹⁹⁹ *Id.* §§ 8(4)(b)–8(5).

²⁰⁰ *Id.* § 7(1).

²⁰¹ The peculiarities of liability in international civil aviation have formed a separate regime for laws and regulations. The Warsaw Convention of 1929 was adopted “to establish uniform rules to ensure adequate and reliable recovery for injury to persons or property,” which would supersede the various conflicting domestic laws and “protect the infant airlines industry from ruinous damage suits.” James David Simpson, Jr., *Air Carriers’ Liability Under the Warsaw Convention After Franklin Mint v. Twa*, 40 WASH. & LEE L. REV. 1463, 1463–64 (1983). Previously, aviation liability was governed by domestic laws of states, which are generally founded on tort law. SHAWCROSS AND BEAUMONT: AIR LAW, *supra* note 115, at 124, 127. These were deemed inadequate because they did not include liability limitation provisions. See Simpson, *supra*, at 1464. The Warsaw Convention was to be the remedy because the liability limitation contained in Article 22 would make for a definite basis of recovery. *Id.* Later on, the fault liability system regime (pursuant to Article 20(1), the legal basis of the liability of the carrier is fault/negligence but with a reversed burden of proof) was changed to a strict liability regime in the Montreal Convention. See Montreal Convention, *supra* note 9, art. 21(1).

²⁰² Adekile, *supra* note 51, at 158.

²⁰³ See Montreal Convention, *supra* note 9, art. 21(1).

not fault-based.²⁰⁴ Passengers can still recover from a carrier even if the cause of delay was not the fault of the carrier if the passengers can prove that the carrier did not take all reasonable measures to avoid the delay.²⁰⁵

3. Contract Law

Carriage by air, as discussed in this article, is a contractual relationship between the passenger and the carrier.²⁰⁶ The air ticket is the contract for the carriage of passengers, and “[t]he air waybill or the cargo receipt is *prima facie* evidence of the conclusion of the contract, of the acceptance of the cargo[,] and of the conditions of carriage mentioned therein.”²⁰⁷ If there is a breach of contract of carriage, a passenger can enforce the obligations of the air operator to its passengers arising from the contractual relationship.²⁰⁸

The time specified in the itinerary or ticket is the time frame in which the air carrier is required to conclude its responsibilities.²⁰⁹ Where the carrier does not comply with the time frame and the flight is delayed, or if there is a change of route, the passenger can sue for damages.²¹⁰ In *Cameroon Airlines v. Mr. Mike Otuizu*,²¹¹ there was a change of route contrary to the agreed itinerary and the passenger did not arrive at the destination.²¹² The court held this to be a breach of contract.²¹³

However, it should be noted that under common law, a carrier is only liable in contract for a breach of duty, hence there is no liability without breach of duty. In *Cameroon Airlines v. Mr. Mike Otuizu*, the court, in establishing a breach of contract, considered the fact that the passenger was never flown to the agreed destination.²¹⁴ The position is different under the Montreal

²⁰⁴ See *id.* art. 19.

²⁰⁵ *Id.*

²⁰⁶ *Id.* arts. 3(5), 11(1).

²⁰⁷ *Id.* art. 11(1).

²⁰⁸ See Steven Raffaele, *Hurry Up and Wait: Air Carrier Liability for Flight Delays*, Presented at the SMU Air Law Symposium, Feb. 21, 2008, at 2, <https://www.hklaw.com/files/Publication/11ae6410-ef17-428b-8807-f2d719a02b50/Presentation/PublicationAttachment/a12061c0-4c8d-4dd5-b065-4e59819c0add/50794.PDF> [https://perma.cc/SC3W-PLMX].

²⁰⁹ See *id.*

²¹⁰ See SHAWCROSS AND BEAUMONT: AIR LAW, *supra* note 115, at 73.

²¹¹ [2011] SC217/2004, 5 (Nigeria).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

Convention and the Civil Aviation Act where the conclusion, or otherwise, of the contract will not affect liability.²¹⁵ Also, under the Montreal Convention and the Civil Aviation Act, a carrier can be liable, for instance, for delay if it has not taken reasonable measures to prevent the delay regardless whether the delay amounts to a breach of duty.²¹⁶

Before claims arising from complete non-performance of the contract of carriage can be made, air carriers must be given an opportunity to perform and provide alternative transportation.²¹⁷ In *Igwe v. Northwest Airlines*, the passengers' refusals of the airline's reasonable offer of alternative transportation and two US\$500 vouchers precluded their claim of complete non-performance by the airline.²¹⁸

IV. CONCLUSION AND THE NEED FOR REFORM

A. INSURANCE COVERAGE

The poor insurance coverage of aircraft in Nigeria has made it difficult for air carriers to effectively pay compensation when required.²¹⁹ A notable reason for this is that aviation insurance premiums are high in Nigeria compared with premiums in other jurisdictions.²²⁰ Insurance should cover instances of damage and injury and must be procurable at a reasonable cost.

B. CARRIER LIABILITY

Specific caps should be put on all liabilities to provide air carriers with greater certainty about what compensation they may be obliged to provide in certain circumstances. Furthermore, the legal regime of liability for third parties on the ground should be expanded. The legal regime should also prescribe the limitation of liability for injury, death, and property damage. The strict liability feature is laudable and should be retained.

In addition to liability for injury, death, and property damage, there is a need for legislation that imposes liability on the car-

²¹⁵ See Civil Aviation Act (Nigeria), *supra* note 17, sched. III, art. 46.

²¹⁶ *Id.* sched. III, art. 19.

²¹⁷ *Iguse v. Nw. Airlines, Inc.*, No. 1-1-05-1423, 2007 WL 43811, at *3 (S.D. Tex. Jan. 4, 2015).

²¹⁸ *Id.* at *4.

²¹⁹ See Kelvin Osa Okunbor, *High Insurance Premiums Slow Down Aviation*, NATION NIGERIA (Jan. 27, 2015), <http://thenationonlineng.net/high-insurance-premiums-slow-aviation/> [<https://perma.cc/5PP2-2Q3W>].

²²⁰ See *id.*

rier for cancellation of flights. Presently, the Civil Aviation Act does not impose liability for cancellation of flights²²¹ and the NCAA regulations only provide for the carrier's liability when a flight is canceled.²²² Since the Civil Aviation Act imposes liability on the carrier for delay,²²³ air carriers are incentivized to cancel flights, rather than delaying the flight, to avoid liability. This is disadvantageous to the passengers.

There is a need for stand-alone legislation addressing the liability of air carriers to passengers for death, bodily injury, delay, denied boarding, and cancellation. This liability should also extend to third parties. This legislation should also be extended to cover aviation insurance. Other jurisdictions, where the laws are based on aviation liability, contain provisions directed toward the subject matter, and Nigeria should as well.²²⁴ This will put an end to victims having to make claims under tort and contract legislation or even under the common law.

C. OTHER REFORM

The consumer protection directorate of the NCAA should intensify its efforts in assessing and investigating each case reported to it. In addition, air carriage users in Nigeria need to be enlightened and sensitized not only to their rights, but also to the duties and obligations of the air carriers during air carriages. Because there is not sufficient precedent on the issue of liability of air carriers to passengers for delay in the Nigerian courts, it is necessary that Nigerian courts interpret the law to impose liability on carriers for delay. It is notable that air carriers have taken advantage of the fact that an average air passenger in Nigeria sees delays as a norm and accommodates such acts without challenging them by taking the course of law. Finally, there is a need to develop academic scholarship in the area of causes of flight delay and flight cancellation in Nigeria and the means to minimize these delays and cancellations.

²²¹ See generally Civil Aviation Act (Nigeria), *supra* note 17.

²²² See Nigeria Civil Aviation Regulations (2015), *supra* note 10, pt. 19.7.

²²³ See Civil Aviation Act (Nigeria), *supra* note 17, sched. III, art. 19.

²²⁴ For instance, in Australia, there is the *Civil Aviation (Carriers' Liability) Act 1959* (Cth) and *Damage by Aircraft Act 1999* (Cth) (these, to some extent, have been amended by the *Aviation Legislation Amendment (Liability and Insurance) Act 2012* (Cth)).